91-1322

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES D. HOLDINESS,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the District Court's order of summary judgment.

PARTIES TO THE PROCEEDING

James D. Holdiness ("Holdiness") was the Appellant in the proceeding in the United States Court of Appeals for the Fourth Circuit, whose judgment is sought to be reviewed.

CSX Transportation, Incorporated ("CSX") was the Appellee in the proceeding below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	4
I. THE DECISION TO GRANT SUMMARY JUDGMENT AS TO THE PETITIONER'S ENTIRE COMPLAINT IS IN DIRECT CONFLICT WITH THE PRIOR HOLDINGS OF THIS COURT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Blair v. Baltimore & O. R. Co., 323 U.S. 100 (1945)	6
Lillie v. Thompson, 332 U.S. 459 (1957)	6, 7
McGivern v. Northern Pac. Ry. Co., 132 F.2d 213 (U.S.C.A. 8th Cir. 1942)	7
Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957)	4, 5, 6
Sinkler v. Missouri Pacific Railroad Company, 356 U.S. 326 (1958)	5
Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944)	7, 8
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943)	6
Webb v. Illinois Central Railroad Co., 352 U.S. 512 (1957)	5, 7
Statutes:	
Judicial Code, 28 U.S.C. § 1254(1)	2
Federal Employers' Liability Act, 45 U.S.C. § 51	2

IN THE

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The November 22, 1991, opinion of the United States Court of Appeals for the Fourth Circuit affirming the District Court's order of summary judgment is an unpublished per curiam opinion (Appendix 1a-2a). The decision of the United States District Court for the District of Maryland affirmed by the Court of Appeals is unreported (Appendix 3a-7a). These opinions are reproduced in the Appendix to this Petition (Appendix 1a-7a).

JURISDICTION

The judgment of the Court of appeals is dated November 22, 1991. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent sections of the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) are as follows:

> § 51. Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * * .
>
> § 56. * * * Under this Chapter an action may be brought in a . . . court of the United States * * * .

STATEMENT OF THE CASE

On February 7, 1990, Holdiness filed suit in the United States District Court for the District of Maryland under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) alleging employer negligence in three separate incidents (on 2/16/87, 6/25/87, and 10/6/87) which resulted in personal injury to him. The details of these incidents are recounted below.

On February 16, 1987, Holdiness was working alone patrolling No. 3 track at the A & P Siding in Baltimore, Maryand. While on his patrol, Holdiness observed that the door to Boxcar FGER 96220 was open. In accordance with his standing instructions from CSX, Holdiness

attempted to close the door and, in doing so, injured his back. CSX knew that the door to Boxcar FGER 96220 was hard to close, but had not warned Holdiness of this defect which was the proximate cause of the injury complained of.

On June 25, 1987, Holdiness was working alone, patrolling CSX's New Yard in Locust Point, Maryland, at 2:30 a.m. CSX, over the past two years, allowed wood, scrap, and other debris to accumulate in the New Yard. CSX was also aware that there was frequent criminal activity in this yard. Despite this, CSX required Holdiness to patrol a debris-filled, high crime area alone. In the early morning hours of June 25, 1987, Holdiness was attacked and injured by a club-wielding criminal assailant who probably obtained his club among the debris in the yard, and sustained serious personal injury.

On October 6, 1987, while working in CSX's Curtis Bay Yard in Baltimore, Maryland, Holdiness was called upon to help in an arrest. While in the course of assisting in said arrest, Holdiness suffered injury which was proximately caused by the negligence of CSX.

CSX answered Holdiness' Complaint denying any negligence on its part on July 27, 1990. Discovery was undertaken and completed prior to trial by all parties. Holdiness' deposition was taken on November 13, 1990. On December 19, 1990, CSX filed a Motion for Summary Judgment as to each of the three incidents complained of in Holdiness' Complaint. Holdiness filed a response to CSX's Motion for Summary Judgment on February 4, 1991.

The District Court granted CSX's Motion for Summary Judgment as to the entire Complaint and entered Judgment in favor of CSX on February 7, 1991.

A timely Appeal was noted on February 19, 1991, to the United States Court of Appeals for the Fourth Circuit. Following the submission of briefs from each of

the parties and argument from each of the parties on October 1, 1991, the United States Court of Appeals for the Fourth Circuit affirmed by unpublished per curiam opinion, the decision of the United States District Court of Maryland on the reasoning of the District Court.

REASON FOR GRANTING THE WRIT

This FELA case presents only one issue for the Court's resolution. That issue is when the grant of a summary judgment motion is appropriate under the FELA. The decision below is in conflict with the prior holdings of this Court and such a conflict can only be resolved by a decision of this Court. This conflict should be resolved in order to bring about uniformity of decision in cases arising under the FELA. For these reasons, the Petitioner prays this Court grant his Petition for a Writ of Certiorari.

I. THE DECISION TO GRANT SUMMARY JUDGMENT AS TO THE PETITIONER'S ENTIRE COMPLAINT BELOW IS IN DIRECT CONFLICT WITH THE PRIOR HOLDINGS OF THIS COURT

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), this Court plainly articulated the negligence standard applicable to cases arising under the FELA:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that

> appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*" to its negligence. (Emphasis added) *Id.*, 506-7.

The Petitioner set forth evidence in responding to CSX's Motion for Summary Judgment that unquestionably met the standard set forth in *Rogers.* With respect to the incident of February 16, 1987, the Petitioner was injured while attempting to close a defective boxcar door (the defect being that the door was tampered with and hard to close) *in obedience to CSX's requirement that the Petitioner attempt to close the door before he requested assistance* (App. 36a).

Here, there are two theories that would support "with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury" complained of. *Id.* 506. First, CSX, although having actual knowledge of the defective condition of the door, by a prior incident the same day, did not warn the Petitioner of the door's condition (App. 11a, 21a-23a, 35a-36a). This alone is sufficient to support a finding of negligence and it is no defense under the FELA that the incident complained of may have been the result, in whole or in part, of the act or omission of a co-employee. *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326 (1958).

Second, a jury could find the procedures the Petitioner was required to follow were unreasonable. If the only way a worker can discover whether or not it is safe for him to perform a task is to begin to undertake it, there is certainly "ample evidence for a jury to determine whether the procedure followed satisfied the standard to be expected from a prudent man in light of the hazard to be prevented." *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 514 (1957) (App. 36a-37a).

The incident of June 25, 1987, involves an assault on the Petitioner by unknown person or persons wielding a

club. This occurred when the Petitioner was patrolling CSX's Locust Point Yard in Baltimore, Maryland. Here again, the Petitioner easily meets the negligence standard required by *Rogers*. It was shown that the yard was debris filled, not having been cleaned up in the two years prior to the incident (App. 38a), and there was a recent increase in criminal activity in the yard, as well (App. 37a). It was further shown that a jury could reasonably conclude the club with which the Petitioner was beaten came from the debris in the Locust Point Yard (App. 38a).

It is well-settled under the FELA that the statutory duty to provide a reasonably safe place in which to work is not a static one. This duty becomes greater and more imperative as the risk increases. *Blair v. Baltimore & O. R. Co.*, 323 U.S. 100, 604 (1945). *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943). In this instance, despite evidence of increased criminal activity and a debris-filled yard, the record discloses complete inaction on the part of CSX.

A *reasonable* jury could conclude that the failure to clean up the yard at reasonable intervals caused or contributed to the harm complained of by providing potential attackers with weapons. Since CSX *knows* of criminal activity in the Locust Point Yard, it is reasonably foreseeable that a lone patrolman may be assaulted by wrongdoers seeking either to escape or continue their wrongful acts.

A case on point is *Lillie v. Thompson*, 332 U.S. 459 (1947), wherein the Plaintiff was required to work in an isolated building in an out-of-the-way part of the railroad's yard that the railroad had reason to know was frequented by dangerous characters. The Plaintiff suffered a severe beating for which she sought damages. The question for the court was whether, under the FELA, the railroad owed the Plaintiff a duty of care to protect her from a reasonably forseeable criminal act. This court held: "that the forseeable danger was from

intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence." *Id.*, 462.

Finally, a reasonable jury could conclude that the failure of CSX to respond to the increase in criminal activity was in itself unreasonable in light of the increased risk to CSX employees. Such a result is entirely consistent with the result in *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512 (1957).

The final incident of October 6, 1987, resulted in the Petitioner being injured while attempting to subdue and handcuff a suspect. At issue here is CSX's duty to provide reasonably safe tools and appliances such as are necessary for the Petitioner to perform his assigned tasks (App. 42a-43a). The Petitioner asserted his injury was proximately caused by the failure of CSX to issue the Petitioner and his co-workers with nightsticks as items of general issue. The Petitioner asserted that if nightsticks had been issued, he would not have been injured (App. 43a). There is no question that part of the nondelegable duty of care imposed on CSX by the FELA is the obligation to provide the Petitioner and others similarly situated with reasonably safe tools such as are necessary for the Petitioner to perform his assigned tasks with. *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (U.S.C.A. 8th Cir. 1942). A reasonable jury could conclude that the failure to provide these tools and appliances, as set forth by the Petitioner, was the proximate cause of the injury complained of.

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 143 A.L.R. 967. Petitioner was required to present pro-

> bative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089, 87 L.Ed. 1458; Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351, 50 S.Ct. 281, 74 L.Ed. 896. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors. *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944).

It is manifest in this case that the lower court has decided to substitute its conclusions for those of a jury. The Petitioner below clearly met his burden and showed there were material facts in dispute between the parties such that CSX's Motion for Summary Judgment should have been denied. The decision of the court below is in clear conflict with the herein cited prior holdings of this Court, such that a decision herein by this Court is vitally necessary.

CONCLUSION

For the reasons set forth above, the Petitioner prays this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1042

JAMES D. HOLDINESS,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INCORPORATED,
Defendant-Appellee,

and

BALTIMORE & OHIO RAILROAD; CHESAPEAKE AND OHIO RAILROAD, body corporates,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-90-445-S)

Argued: October 1, 1991
Decided: November 22, 1991

Before HALL and MURNAGHAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Roger John Greezicki, SAVAGE & SCHWARTZMAN, Baltimore, Maryland, for Appellant. Stephen Bennett Caplis, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellee. ON BRIEF: Irving Schwartzman, SAVAGE & SCHWARTZMAN, Baltimore, Maryland, for Appellant. H. Russell Smouse, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellee.

OPINION

PER CURIAM:

James Holdiness filed this action pursuant to the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, alleging that the negligence of his employer, CSX Transportation, Inc., caused him to suffer injuries on three separate occasions. Holdiness appeals the district court's order of summary judgment.

Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court, *James D. Holdiness v. CSX Transportation, Inc.*, No. CA-90-445-S (D. Md. February 7, 1991).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 90-445

JAMES D. HOLDINESS,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

MEMORANDUM OPINION

[Feb. 8, 1991]

This is a case filed pursuant to the Federal Employer's Liability Act (FELA) for injuries suffered on three different occasions by the plaintiff, a railroad police officer. The defendant has moved for summary judgment, which the plaintiff has opposed, and no oral hearing is deemed necessary.

The FELA, despite numerous legislative efforts to reform it to resemble the familiar no-fault workers' compensation schemes applicable to almost all other industrial and office workers in the United States, remains a fault-based system, under which an injured railroad employee, to recover, must show that the negligence of his or her employer played a part, however slight, in producing the injury. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957). The fact that an action is brought under the FELA does not, however, alter the imperatives of Rule 56(c), as recently interpreted by the Supreme Court in *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242 (1986). Under Rule 56, as interpreted in the cited cases, to avoid summary judgment, the plaintiff must produce evidence that, were the case at the directed verdict stage, would justify a reasonable fact-finder in finding for the plaintiff, without speculation or guesswork, under the applicable standard of proof. Because plaintiff in this case has not produced such quantum of evidence, the defendant's motion will be granted, for reasons as stated below.

First, as to the incident of February 6, 1987, (Case A), in which plaintiff suffered back pain while closing a boxcar door, although the plaintiff has produced evidence that another policeman had earlier found the same door hard to close and asked for assistance in closing it, there is no evidence, as from an inspection, etc., that there was in fact any defect in the door, and, more importantly, the evidence (plaintiff's deposition at 32-41) is that plaintiff chose not to utilize the tools or extra help that were available to him to help close the door, but simply chose to close the door by himself. Thus, because no defect other than the fact that the door was earlier found hard to close has been shown, the evidence fails to make out a case for even the slight amount of railroad negligence that must be shown under FELA to warrant submission of the case to a jury, and summary judgment will be awarded the railroad as to Case A.

Next, as to the incident of June 25, 1987, (Case B), plaintiff was injured while patrolling a rail yard at 2:30 a.m., when jumped by two assailants, one of whom hit him with a club which, according to plaintiff, resembles wood that is found lying around the yard, although the plaintiff could not definitively identify the origin of the wood club. Plaintiff argues railroad negligence in having the yard in such condition that the wood could be picked up and used as a club. Obviously, a railroad is not charged with a duty of care, even under the attenuated negligence standard of FELA, that requires it to clean

up every piece of yard trash that could be turned into a weapon by an assailant bent on doing mischief to a policeman. Indeed, no one's home or office is free of potential weapons, and it would be ludicrous to hold the railroad liable under a negligence standard if, say, a disappointed stockholder attacked the CEO's secretary with the flower vase on his or her desk, which happened to have been paid for by the railroad and placed there by its interior designer. Because railroad yards could not be kept free of potential weapons even under the utmost exercise of care, no negligence inheres in the presence of the wood "club," even assuming that it was a piece of rail yard trash.

Plaintiff's second ground of negligence as to Case B is an alleged deficiency in the lighting of the yard. Because plaintiff himself has admitted in deposition that he cannot state whether additional lighting would have done anything to disclose the presence of his darkly-attired attackers, deposition at 73, he has not made out a sufficient causal connection between the absence of more lighting and the infliction of injury upon him to survive summary judgment.

For his third contention of negligence as to Case B, plaintiff claims that there should have been more patrol officers assigned to the yard, which could have prevented his being jumped by the assailants. This argument, however, does not raise a jury question, for there is no evidentiary basis upon which a jury could conclude without speculation that the railroad owed its police officers a duty to see that they did not patrol alone and that breach of that duty was a proximate cause of plaintiff's injury. After all, police officers, by the very nature of their jobs, are sent into dangerous places, and the judgment of their employers as to how many officers are needed to do the job should not be subject to a jury's *post factum* review under a negligence standard, simply because one officer was hurt on one occasion.

Finally, as to the injury of October 6, 1987, (Case C), plaintiff claims that the railroad was negligent in not furnishing him with a nightstick, by which he could have subdued a large, resisting suspect before the suspect (who was being apprehended by another officer to whose assistance plaintiff had been called) could have managed to land a blow on plaintiff. The difficulties with this argument are, first, that plaintiff could have used, but chose not to, his revolver to threaten the suspect into submission, and, second and more importantly, that plaintiff did in fact subdue the suspect with one blow from plaintiff's large metal flashlight. There is no proof that the flashlight would have been insufficient to this purpose had plaintiff chosen to apply it to the suspect's head before the suspect got a punch off at plaintiff, nor is there any proof that more than two officers were reasonably required to put the suspect under submission. In short, there is insufficient evidence of railroad negligence to warrant submitting Case C to the jury, and summary judgment must also be entered in that case in favor of the defendant.

The Court has considered the parties' other arguments, but finds that none of them merits discussion, in light of the foregoing analysis.

For the reasons stated, an order will be entered separately, granting the defendant's motion for summary judgment, and entering judgment in its favor.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
U.S. District Judge

Dated: February 7th, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 90-445

JAMES D. HOLDINESS,

Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

JUDGMENT ORDER

For the reasons stated in a Memorandum Opinion of even date herewith, it is, by the Court, this 7th day of February, 1991, ORDERED and ADJUDGED:

1. That the defendant's Motion for Summary Judgment BE, and the same hereby IS, GRANTED.

2. That judgment BE, and it hereby IS, ENTERED in favor of the defendant, and against the plaintiff, as to the entire complaint, with costs; and

3. That the Clerk mail copies hereof and of the foregoing Memorandum Opinion to counsel.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES D. HOLDINESS,

Plaintiff,

v.

CSX TRANSPORTATION, INC.,

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, CSX Transportation, Inc., by its undersigned counsel, moves, pursuant to Federal Rule of Civil Procedure 56, for summary judgment on all claims of the Plaintiff in this case. The grounds of the motion are as follows:

1. Plaintiff, James D. Holdiness, formerly a special agent for Defendant, CSX Transportation, Inc., has created three distinct claims pursuant to the Federal Employers' Liability Act (FELA) for alleged personal injuries resulting from the alleged negligence of the Defendant on three different dates.

2. On February 16, 1987, Holdiness attempted to close an open boxcar door which he had discovered at the A&P Siding in Halethorpe, Maryland. He attempted to close the door, as it appeared free of defect. As he tried to push the door closed, he "felt a real sharp pain" in his back. On the prior shift, Special Agent Howard W.W. Thorn had spotted the same boxcar door open, and had closed and sealed the door with the assistance of Special Agent Joseph Kidwell. Thorn saw no defect in the door. Holdiness knew that, if he encountered a door which was difficult to close, he was to call upon the car department for various assistance.

3. On June 25, 1987, Holdiness was patrolling the Locust Point Yard, checking freight cars, when he was attacked by two unknown assailants, from an unknown hiding place. Holdiness does not know if additional lighting would have revealed the assailants prior to the incident. One of the assailants attacked Holdiness with a wooden "club", which Holdiness produced at his deposition. Holdiness claims that the wood "resembles" wood in the railroad yard, but he does not know where it came from.

4. On October 6, 1987, Holdiness responded to a call for assistance from Special Agent Thorn at the Curtis Bay Yard. After a fairly length chase, Thorn and Holdiness cornered a suspected trespasser/thief on Cambria Street. The suspect simulated a firing position, but was observed to be unarmed. Thorn grabbed the suspect, Holdiness went to assist Thorn, and the suspect struck Holdiness one time. Holdiness subdued the suspect by striking him with a Kel-light flashlight. Holdiness speculates that more railroad personnel or additional weaponry might have altered the incident somehow, but he has not offered any such proof.

5. Defendant contends that there is no dispute as to any material fact, and it is entitled to judgment on all three claims as a matter of law.

6. Pursuant to Local Rule 105.1, Defendant attaches a memorandum of reasoning and authorities in support of this motion.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES P. HOLDINESS,
Plaintiff

v.

CSX TRANPORTATION, INC.,
Defendant

MEMORANDUM OF REASONING AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant CSX Transportation, Inc. (hereinafter "Railroad"), by its undersigned counsel, for memorandum of reasoning and authorities in support of its motion for summary judgment, states:

I. UNCONTRADICTED MATERIAL FACTS [1]

A. *Background Facts*

1. As of February 16, 1987, Holdiness was a 39 year-old Special Agent for the Railroad, and had been employed as a police officer with the Railroad for some seventeen (17) years. (Holdiness Dep. [Exhibit A, attached], pp. 4, 10).

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[1] All of the facts are derived from the deposition testimony of Plaintiff, James D. Holdiness (hereinafter "Holdiness") or the Affidavit of Special Agent Howard W.W. Thorn, III (hereinafter "Thorn"), as permitted by Federal Rules of Civil Procedure 56(c) and (e). A copy of the Holdiness deposition transcript is attached, marked "Exhibit A". The Thorn Affidavit is attached, marked "Exhibit B". The Affidavit of Judith A. Hersey, who took the photographs of the wood allegedly involved in the June 25, 1987 incident, and the photographs themselves, are attached, marked "Exhibit C".

2. Holdiness carried a three fifty-seven magnum Colt revolver, Kel-light stainless steel flashlight, Big Ben lantern, hard hat, wire twister, and bolt bender, while on the job (Exhibit A, pp. 11, 93, 99)

3. As a patrolman/Special Agent, it was Holdiness' duty to protect Railroad employees and property (Exhibit A, p. 12).

4. The railroad yards which Holdiness patrolled (Locust Point, Curtis Bay, Jessup and others) were at least ten square miles in size (Exhibit A, pp. 12-14).

5. If Holdiness needed assistance, he would radio on a walkie-talkie (Exhibit A, p. 16). Usually, three Railroad police patrolled the Baltimore yards on a given shift (Exhibit A, p. 17).

6. During patrol, railcar doors should be closed (Exhibit A, p. 19). If an open door were discovered, Holdiness was to check the car's contents, report any missing goods, look for suspects and missing goods, close and reseal the door (Exhibit A, p. 19). If the door was difficult to close, Holdiness was to call the car department to help close the door (Exhibit A, pp. 19-20).

B. *Incident of February 16, 1987*

1. In the early morning of February 16, 1987, while patrolling at A&P Siding in Halethorpe, Maryland, Holdiness noticed an open door on boxcar FGER 96220 (Exhibit A, pp. 31-32, and Exhibit 1 of the deposition).

2. On the prior shift, on February 15, 1987, Special Agent Thorn had also noticed an open door on boxcar FGER 96220, inspected it, and closed the door with assistance from Special Agent Joseph Kidwell. Thorn saw no defects on the door (Thorn Affidavit [Exhibit B], pp. 1-2).

3. Holdiness knew, and assumed, that the open door on FGER 96220 was the same car as that which Thorn had reclosed and resealed (Exhibit A, pp. 37-38).

4. Holdiness approached the boxcar, checked it for missing contents, saw no defects on or about the door, attempted to close the door and "felt a real sharp pain in my back" (Exhibit A, pp. 32-40).

5. Holdiness knew he could call the car department for assistance, but, because the door seemed to be properly aligned, Holdiness believed he could close it alone (Exhibit A, pp. 34-36). Holdiness knew that the car department had pull jacks available for closing the door, but he did not request one (Exhibit A, pp. 40-41).

C. *Incident of June 25, 1987*

1. On June 25, 1987 at approximately 2:30 a.m., Holdiness was on patrol at Locust Point yard when he was attacked by two assailants who came upon him from an unknown location (Exhibit A, pp. 71-73, and Deposition Exhibit 3).

2. The assailants attacked Holdiness with "a large club" (Exhibit A, p. 74).

3. Holdiness brought a "club" to the deposition (Deposition Exhibit 4, of which photographs, properly certified, are attached as exhibit C) which he claims is the "club" used by the assailants (Exhibit A, pp. 74-75).

4. Holdiness states that the club "resembles the wood laying around the railroad yard" (Exhibit A, p. 75).

5. Holdiness has no knowledge of where the wood came from (Exhibit A, p. 75).

6. While Holdiness claimed on his accident form that the lighting was "deficient" (Deposition Exhibit 3), he explained that, as he did not know the assailants' location, he could not state whether additional lighting would have disclosed the presence of the assailants prior to the incident (Exhibit A, p. 73).

D. *Incident of October 6, 1987*

1. In the early morning of October 6, 1987, Holdiness received a radio call for assistance from Agent Thorn at the Curtis Bay yard (Exhibit A, pp. 90-91; Exhibit B, p. 2).

2. In response to the call, Agent Thorn and Holdiness chased, and caught up with, a suspected trespasser/thief on Cambria Street (Exhibit A, pp. 91-93; Exhibit B, p. 2).

3. The suspect turned toward Holdiness and Thorn, and took a firing position, but was observed to be unarmed (Exhibit A, p. 92; Exhibit B, p. 2).

4. Thorn attempted to place the suspect under arrest, but the suspect (6'3" in height and weighing approximately 265 pounds) resisted (Exhibit A, pp. 92-93; Exhibit B, pp. 2-3).

5. Holdiness attempted to assist Thorn at this point. The suspect struck Holdiness once, and then Holdiness struck the suspect once with his (Holdiness') Kel-light stainless steel flashlight (Exhibit A, p. 93 and Exhibit B, p. 3).

6. The Kel-light flashlight can act as a baton or nightstick (Exhibit B, p. 3).

7. Holdiness criticized the Railroad for not providing enough men or enough equipment, but Holdiness did not indicate how additional manpower or equipment would have prevented the single blow from the suspect (Exhibit A, pp. 94-95).

8. Holdiness' use of the Kel-light enabled him and Thorn to cuff the suspect (Exhibit A, p. 95; Exhibit B, p. 3).

9. Holdiness chose not to attempt to apprehend the suspect by use of his (Holdiness') magnum revolver, because it is Holdiness' practice to draw his gun only when

he is going to use it (Exhibit A, pp. 96-97). Holdiness made this decision, even in light of the suspect's size and inebriated condition (Exhibit A, p. 98).

II. ARGUMENT

A. *Incident of February 16, 1987*

From the foregoing facts, in parts IIA and IIB, it is clear that the Railroad had no notice of a defective condition on the door of FGER 96220 at the time of Holdiness' mishap. *O'Hara v. Long Island Railroad Company*, 665 F.2d 8 (2nd Cir. 1981). Moreover, as Agent Thorn (with assistance) had closed the door on the previous shift, and had not perceived any defect in the door, the Railroad had every reason to believe that the door was simply heavy, and not defective (Exhibit B, pp. 1-2).

Holdiness knew that assistance was available to close the door. He was the man on the scene. He chose to close the door by himself. *Wadiak v. Ollinois Cent. R. Co.*, 208 F.2d 925 (7th Cir. 1953).

Nor can Holdiness rely on *res ipsa loquitur*. He was handling the door when the incident occurred. There can be no inference of negligence independent of Holdiness himself. *Wadiak*, at p. 928; *Stillman v. Norfolk v. Western Railway Company*, 811 F.2d 834, 837 (4th Cir. 1987). As in *Mosco v. Baltimore & Ohio Railroad*, 817 F.2d 1088 (4th Cir. 1987), the sole cause of this incident appears to be Holdiness himself, either the technique he used or his failure to request assistance.

B. *Incident of June 25, 1987*

Holdiness admits that the assailant may well have remained hidden from view, regardless of the amount of lighting available. Thus, even if the Railroad had supplied insufficient lighting (and there is no evidence, expert or otherwise, as to what the "sufficient" level would be), there is no causal connection between lighting and

the incident. See IIC *supra*, and *Hurley v. Patapsco & Back Rivers R. Co.*, 888 F.2d 327, 329 (4th Cir. 1989) (directed verdict upheld because no competent evidence of insufficient lighting). See also *Atchison T & S.F. Ry. Co. v. Toops*, 281 U.S. 351 (1931); *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943) (causation a necessary element of an FELA claim).

As to the club, Holdiness admits that he has no knowledge that the "club" actually was wood from the rail yard. In fact, Holdiness testified that he "guessed" the club came from the rail yard because it "resembled" wood from the yard. The photographs attached demonstrate that the wood has no unusual characteristics which would indicate that it was the property of the Railroad (Exhibit C). In these circumstances, Holdiness has simply not provided competent proof to authenticate the wood as the Railroad's. Wigmore, *On Evidence*, Vol. VII, § 2129, particularly at pp. 704-705 (1978 ed.); *Moore's Federal Practice*, Vol. II, Article IX, pp. 9-16 and 9-17, § 901.4 (2nd ed. 1989). *Richendollar v. Diamond M. Drilling Company*, 784 F.2d 580, 582 (5th Cir. 1986); contrast *United States v. Browne*, 829 F.2d 760, 766 (9th Cir. 1987) (gun admissible when witnesses expressed "certainty" as to its use in a robbery).

Even if the wood were admissible, Holdiness has made no case that the particular wood used in the incident had been at the rail yard for any particular time to put the railroad on notice. *O'Hara*, supra. Moreover, as Holdiness indicated, his job was to protect Railroad employees and property, and if he believed the wood to be dangerous, it was his duty to remove it or otherwise notify the appropriate Railroad personnel. As in *Sowards v. Chesapeake & O. Ry. Co.*, 580 F.2d 713, 715 (4th Cir. 1975), the employer "could not be negligent in failing to warn" Holdiness "of the presence" of the wood as Holdiness had "seen" the wood on numerous occasions.

Finally, the Railroad contends that it is simply not foreseeable that a piece of wood, from parts unknown, would be used to harm Holdiness. Under any interpretation of the FELA's elements, the instant factual scenario was not one reasonably foreseen by the Railroad. Compare *Aldridge v. Baltimore and Ohio R. Co.*, 789 F.2d 1061 (4th Cir. 1986) *aff'd en banc* 814 F.2d 157 (1987) *vacated* and *remanded* 486 U.S. 1049 (1988) *reh'g damages only* 866 F.2d 111 (4th Cir. 1989).

C. *Incident of October 6, 1987*

Holdiness criticizes the lack of manpower present at the scene, but offers no evidence that more Railroad personnel would have prevented the one blow which the subject landed upon Holdiness. *Toops* and *Brady*, both *supra*. He and Thorn both state that the one blow from the Kel-light flashlight was sufficient to subdue the suspect, so that the Railroad apparently did provide sufficient personnel to perform their police duties on that occasion. The Railroad is not an insurer of its employees' welfare; Holdiness' attempt to make the Railroad responsible for a single punch thrown by a criminal suspect can only succeed if the Railroad is so held. *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138 (1960); *Ambold v. Seaboard Air Line Railroad Company*, 345 F.2d 30 (4th Cir.) cert. den. 382 U.S. 831 (1965); *Bridger v. Union Railway Company*, 355 F.2d (6th Cir. 1966).

Even if Holdiness could prove that the Railroad should provided him with additional help, his proof utterly fails to show that further help would have prevented the injury. In *St. Louis-San Francisco Ry. Co. v. Mills*, 271 U.S. 344 (1926), a car inspector was shot and killed during the strike during a rail strike. The Supreme Court held that decedent's estate had failed to demonstrate a causal connection between the lack of additional guards (there was one) and the killing:

> ". . . Whether one or more additional guards would have prevented the killing is in the highest degree

> speculative. The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companions had seated themselves in the car. Without warning they fired a volley into the car, and fled. Decedent and his guard were armed, but had no opportunity to defend themselves. *On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been* present. . ."

277 U.S. 347, (emphasis supplied, citations omitted). Likewise, in this case, a jury should not have to conjecture whether the suspect, in his inebriated condition and given his evident size (Exhibit A, p. 94, pp. 97-98, Exhibit B, pp. 2-3), would have landed a single punch on Holdiness, even if more help were available.

As to the "lack of nightstick", Holdiness testified that he himself had not sought to arm himself with this particular weapon, although he could have done so (II C., *supra*, Exhibit A, p. 100). See Wadiak, supra. Moreover, the effect of the presence of a nightstick is just as speculative as the "additional manpower" conjecture. *Mills, supra.* Finally, Holdiness admits, and Thorn confirms, that use of the Kel-light flashlight effectively subdued the suspect. Both negligence and proximate cause are lacking from Holdiness' own proof, and Thorn's Affidavit (IIC, *supra*).

III. CONCLUSION

The Railroad contends it is entitled to summary judgment on each of the three claims in this case because:

A. The February 16, 1987 incident involved no defect of the door. Manpower and tools were available from the car department had Holdiness desired assistance to close the door. Any damage to the door between Agent Thorn's shift and Holdiness' encounter was totally unknown to

the Railroad, as Holdiness was the next subsequent inspector, after Thorn.

B. The June 25, 1987 incident was caused by assailants performing a criminal act, for which the Railroad is not responsible. *Sowards, supra.* Holdiness admits that deficient lighting, if it existed, had no causal relationship to the incident. The wooden "club" used by one of the assailants had not been identified as the Railroad's; moreover, by itself, the piece of wood was not a reasonably foreseeable weapon. Even if its use as a weapon could have been foreseen, the danger was known to Holdiness, who testified that he had seen such wood lying around "for two years" in the yard. *Id.*

C. The incident of October 6, 1987, the single punch from a large, inebriated arrestee, is a danger inherent to Holdiness' job. Neither additional manpower nor additional weaponry would probably or necessarily have prevented the one punch. Moreover, Holdiness chose to use his Kel-light flashlight, which did succeed in subduing the suspect. Holdiness also chose not to arm himself with a nightstick.

D. If, for any reason, the Court determines not to grant summary judgment on all claims, the Railroad alternately requests the Court to grant summary judgment as to those claims for which the Court determines that there is no dispute as to material fact and the Railroad is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ H. Russell Smouse
H. RUSSELL SMOUSE

/s/ Stephen B. Caplis
STEPHEN B. CAPLIS
Whiteford, Taylor & Preston
Signet Tower—Suite 1400
Seven Saint Paul Street
Baltimore, Maryland 21202-1626
(301) 347-8700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 1990, I mailed, postage prepaid, a copy of Defendant's Motion for Summary Judgment; supporting Memorandum and Exhibits B and C to the following:

Irving Schwartzman, Esquire
Savage and Schwartzman
5 Light Street, 10th Floor
Baltimore, Maryland 21202

/s/ Stephen B. Caplis
STEPHEN B. CAPLIS

EXHIBIT B

AFFIDAVIT

I, the undersigned, a male citizen of the State of Maryland, over the age of eighteen (18) years, do affirm on my personal knowledge and pursuant to the penalties of perjury as follows:

1. I have been a Special Agent for CSX Transportation, Inc., or its predecessors, for over fifteen (15) years. Among my duties as a Special Agent, I inspect freight, and I check for damage or vandalism or break-in to various rail cars that are located in various yards owned or operated by CSX Transportation, Inc. in the State of Maryland. I also have the power, authority and responsibility to apprehend and arrest those persons caught committing offenses, such as theft or assault on CSX Transportation, Inc. property.

2. On February 15, 1987, I was inspecting boxcars at the A&P Siding, when I discovered five (5) boxcars whose doors were opened to various degrees, with seals missing, which conditions indicated that the doors had been tampered with. Among the railcars I inspected was boxcar FGER 96220. After inspecting that boxcar and determining that it could be closed and resealed, I attempted to close the door. The door would not respond to my force, so I called for assistance. With the help of Joseph Kidwell, another Special Agent, I was able to close the door of that boxcar. There was no apparent defect in the door, but it was simply hard to close. As of 5:00 p.m. or thereabouts on February 15, 1987, to my personal knowledge, the doors of boxcar FGER 96220 had been resealed. Generally, boxcar doors are heavy, and many take more than one person to close. In fact, I have had occasion to need assistance to close a new boxcar door which had been tampered with and opened.

3. On October 6, 1987 at approximately 4:07 a.m. I entered the east end of Curtis Bay Yard in order to check the security of certain high value loads. I observed a white Ford pickup truck at that time, backed up to the railroad tracks near the scale house, within the confines of the Curtis Bay Yard. At that time, I further observed two (2) white males standing at the rear of the truck. They immediately started running west into a woods adjacent to the railroad yard.

I requested assistance from Special Agents W.E. Wiitala and James D. Holdiness, who both responded to the scene. Subsequently, I saw one of the suspects running west on Cambria Street, and as Special Agent Holdiness pulled his vehicle into the intersection of Cambria Street and Fairhaven Avenue, the suspect turned and brought his hands from behind his back as if he were armed, into a two-hand stance pointed at Holdiness. The suspect was observed to be unarmed at that time.

I exited my vehicle at that location and a foot chase began west on Cambria Street. Special Agent Holdiness and myself caught up with the suspect about one-half block further along Cambria Street and attempted to place him under arrest. The suspect was six foot three inches (6' 3") in height and weighed approximately 265 pounds. I was six foot two inches (6' 2") tall and weighed 245 pounds at that time. Special Agent Holdiness was approximately five foot eleven and a half inches (5' 11 1/2") tall and weighed approximately 180 to 185 pounds. The suspect struck at me with his fist and missed. He then shoved me.

As Special Agent approached the suspect and me, the suspect attempted to break away from my grasp and struck me in the right shoulder. He then turned toward Holdiness and struck him in the left side with his fist. I attempted to grab the suspect again and Special Agent Holdiness struck the suspect over his left eye with Holdi-

ness' kel-light, and that blow stunned the suspect long enough for us to handcuff him.

Kel-light is a flashlight with an extended handle which acts as a baton or nightstick. Special Agent Holdiness' kel-light had been issued to him to the best of my knowledge. Mine was also issued by the railroad. Both myself and Special Agent Holdiness had purchased firearms which we were both carrying at this time. We were required to carry firearms by both railroad and Maryland State regulations.

Because the suspect was unarmed, it was our duty to physically subdue him in any event. The kel-light was adequate to stun the suspect and, in effect, permit us to capture him.

/s/ Howard W. W. Thorn, III
Special Agent
HOWARD W. W. THORN, III

DATED: November 27, 1990

EXHIBIT C

AFFIDAVIT

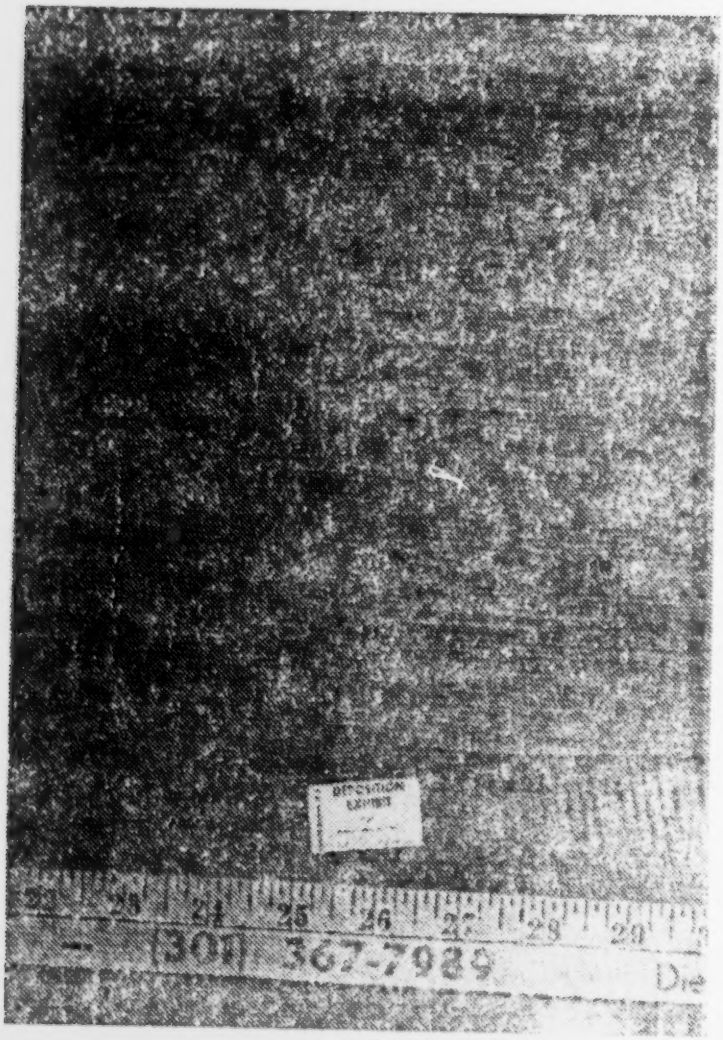
I the undersigned am a female citizen of the State of Maryland over the age of eighteen (18) years and am competent to testify to the within matters on my personal knowledge and under the penalties of perjury:

1. I am presently employed as a legal secretary at the law firm of Whiteford, Taylor & Preston at Suite 1400, Seven Saint Paul Street, Baltimore, Maryland 21202. I have been so employed for the past three (3) years.

2. On Monday, December 10, 1990, at the offices of Whiteford, Taylor & Preston, I took photographs of a single piece of wood marked Holdiness Deposition Exhibit 4. Those photographs are attached to this Affidavit. The photographs are a fair and accurate representation of the piece of wood.

3. The piece of wood itself is located at the office of Stephen B. Caplis, Esquire, an attorney-partner of Whiteford, Taylor & Preston, on the 13th floor, Seven Saint Paul Street, Baltimore, Maryland 21202.

/s/ Judith A. Hersey
JUDITH A. HERSEY



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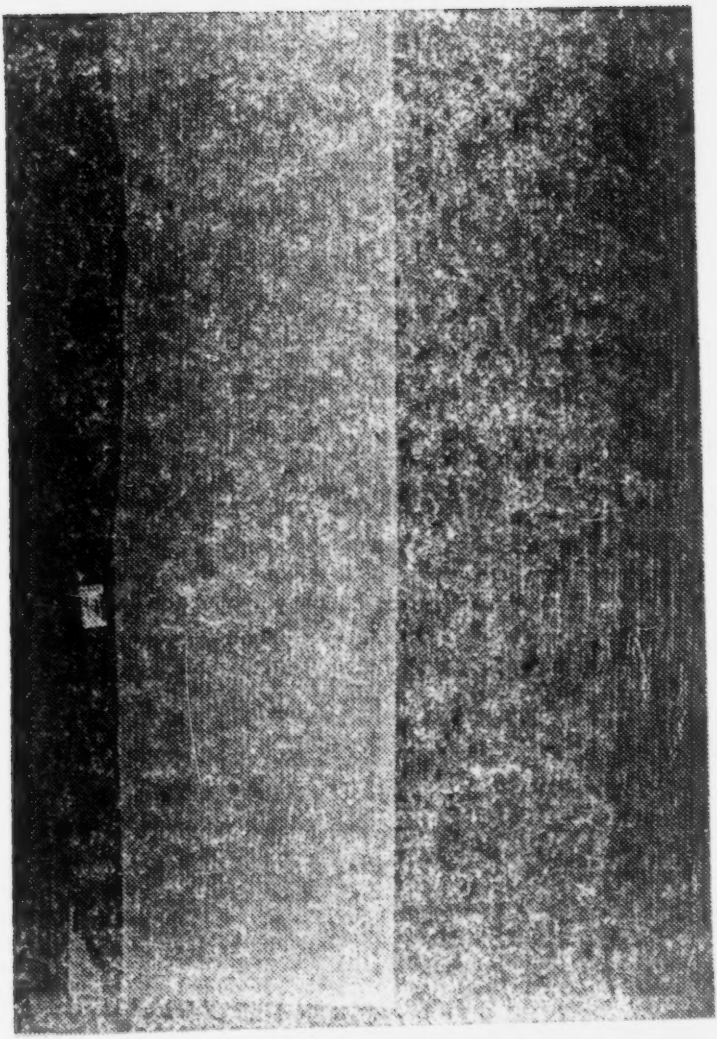

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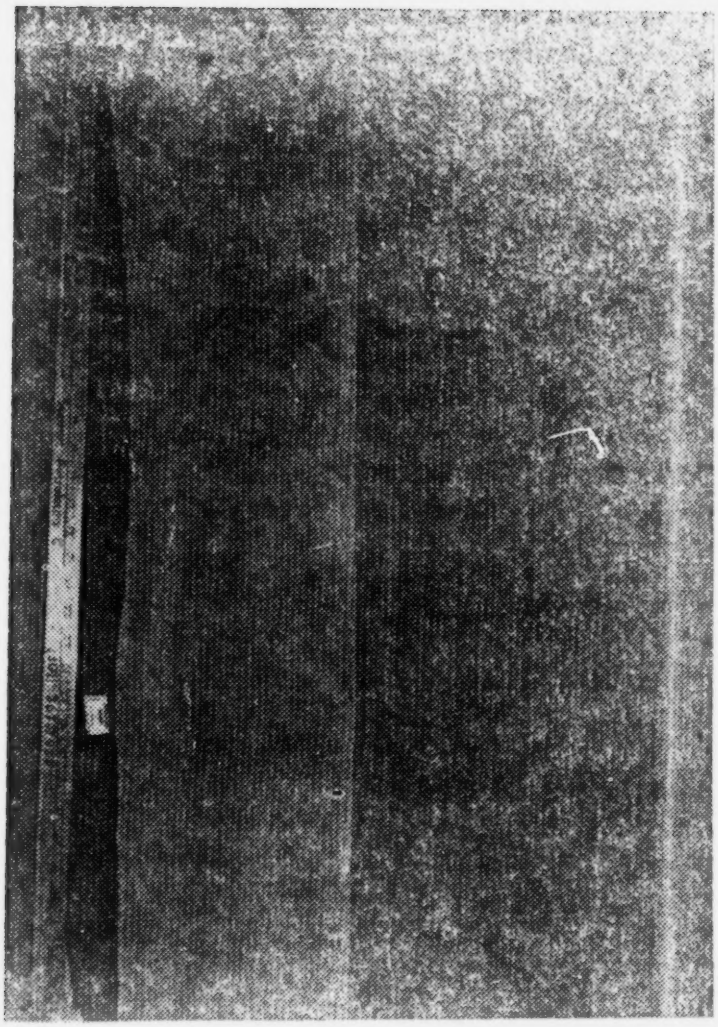

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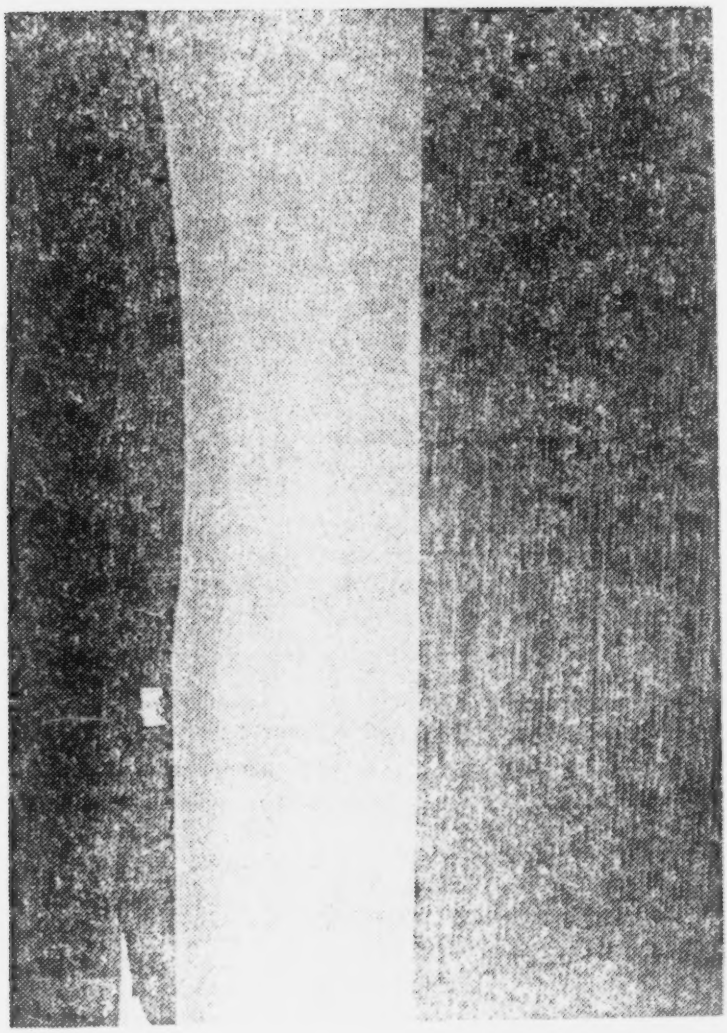

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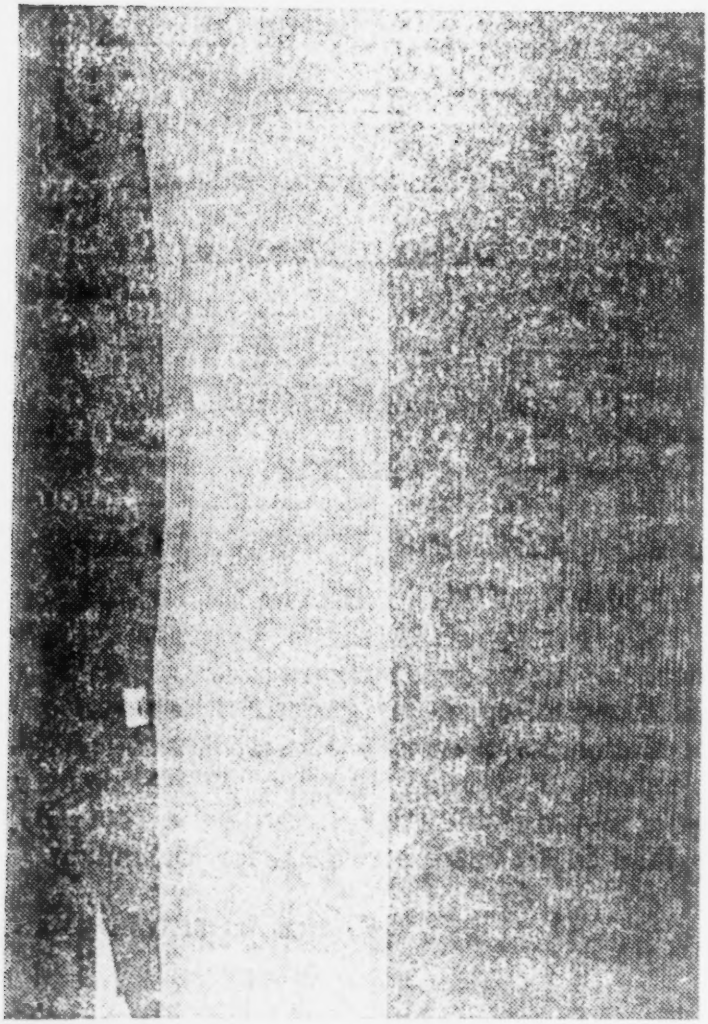

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES D. HOLDINESS,
Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 1991, a copy of Plaintiff's Response to Defendant's Motion for Summary Judgment and Memorandum of Authorities in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment was hand-delivered to Stephen B. Caplis, Esquire, Whiteford, Taylor & Preston, Seven Saint Paul Street, Suite 1400, Baltimore, Maryland 21202-1626, attorneys for Defendant.

SAVAGE & SCHWARTZMAN, P.A.

/s/ Irving Schwartzman
5 Light Street, 10th Floor
Baltimore, Maryland 21202
(301) 685-2713
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES D. HOLDINESS,

Plaintiff

v.

CSX TRANSPORTATION, INC.,

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the Plaintiff, James D. Holdiness, by Savage & Schwartzman, P.A., and Irving Schwartzman, his attorneys, and responds to the Defendant's Motion for Summary Judgment as follows:

1. That based upon the Plaintiff's Answers to Defendant's Interrogatories, the Plaintiff's Deposition (both of which are attached to the Plaintiff's Memorandum as Exhibits A and B, respectively), and the existing law governing actions arising under the F.E.L.A., the Defendant is not entitled to summary judgment.

WHEREFORE, the Plaintiff prays this Honorable Court deny the Defendant's Motion for Summary Judgment.

SAVAGE & SCHWARTZMAN, P.A.

/s/ Irving Schwartzman
IRVING SCHWARTZMAN
5 Light Street, 10th Floor
Baltimore, Maryland 21202
(301) 685-2713
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES D. HOLDINESS,
Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the Plaintiff, James D. Holdiness, by Savage & Schwartzman, P.A., and Irving Schwartzman, his attorneys, and, pursuant to Local Rule 105 submits this Memorandum in support of his Response to Defendant's Summary Judgment Motion.

I. STANDARD OF REVIEW APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

The basic standards and procedures governing summary judgment motions are set forth in Federal Rule of Civil Procedure 56. That Rule in relevant part (F.R.C.P. 56(c)) provides that a Motion for Summary Judgment shall be granted to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The purpose of the summary judgment rule is not to try the case on its merits, but to determine whether any

real dispute exists as to any material fact. *Swettlen v. Wagoner Gas & Oil, Inc.*, 369 F.Supp. 893 (U.S.D.C. Pa. 1974). *Becker v. Safelite Gas Corp.*, 244 F.Supp. 625 (U.S.D.C. Ks. 1965). *Walgren v. Howes*, 482 F.2d 95 (U.S.C.A. 1st. Cir. 1973). As the above-cited rule indicates, there are two separate issues upon which the moving party must prevail before a summary judgment motion may be granted: whether the moving party has shown there is no dispute as to any material fact *and* whether, based on that showing, the moving party is entitled to judgment as a matter of law.

In determining whether a dispute as to material fact exists, all inferences are drawn in favor of the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

Finally, the points of similarity between a motion for directed verdict under Federal Rule of Civil Procedure 50 and a motion for summary judgment under Rule 56 should be noted here. Under both rules, the moving party must show an absence of issues of material fact and that the moving party is, as a matter of law, entitled to prevail. Motions made under either rule require all inferences be drawn in favor of the non-moving party. (See generally Wright & Miller, *Federal Practice and Procedure*, § 2713.1). Essentially, both motions call upon the court to make the same determination and therefore, a case which sets forth the standard necessary to make out a jury question under the F.E.L.A. sets forth a standard applicable to both rules in determining whether a summary judgment or directed verdict should be granted or denied.

The Supreme Court has addressed itself to the question of what standard shall be applied to cases arising under the F.E.L.A. to determine whether or not a jury question has been made out most directly in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). In that case, the Supreme Court said:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added) *Id.*, 506-7.

The Plaintiff contends that the twin questions here, whether there is any genuine dispute as to any material fact and whether, in the absence of such dispute, the Defendant is entitled to judgment as a matter of law must be decided in the context of the standard set forth in *Rogers* above. Simply put, in order to prevail here, the Defendant must show that there is no dispute as to any material fact that the negligence of the Defendant did not play the slightest part in producing the injury for which the Plaintiff is seeking damages. Failure on the part of the Defendant to meet the above standard must result in the denial of the Defendant's Summary Judgment Motion.

II. ANALYSIS OF FACTS AND AUTHORITIES CONCERNING PLAINTIFF'S CASE A, THE OCCURRENCE OF FEBRUARY 16, 1987

In his Deposition, the Plaintiff testified part of his normal duties as a railroad policeman was to close and secure open doors on loaded boxcars. (Exhibit B pp. 32-4) It was the practice of the Plaintiff to inspect the door of a boxcar prior to attempting to close it. If the door appeared to be lined up on its tracks and otherwise exhibited no defects, the Plaintiff would attempt to close it himself. (Exhibit B pp. 35-6) The Plaintiff further testified that at the time of the incident, the procedure under which he operated in the normal course of his duties required him to attempt to close the door by himself and only summon aid if a problem developed. (Exhibit B p. 36)

The affidavit of Special Agent Howard W. W. Thorn, III, reads, in relevant part as follows:

> On February 15, 1987, I was inspecting boxcars at the A&P Siding, when I discovered five (5) boxcars whose doors were opened to various degrees, with seals missing, which conditions indicated that the doors had been tampered with. Among the railcars I inspected was boxcar FGER 96220. After inspecting that boxcar and determining that it could be closed and resealed, I attempted to close the door. The door would not respond to my force, so I called for assistance. With the help of Joseph Kidwell, another Special Agent, I was able to close the door of that boxcar. There was no apparent defect in the door, but it was simply hard to close. As of 5:00 p.m. or thereabouts on February 15, 1987, to my personal knowledge, the doors of boxcar FGER 96220 had been resealed. Generally, boxcar doors are heavy, and many take more than one person to close. In fact, I have had occasion to need assistance to close

a new boxcar door which had been tampered with and opened.

Despite the Defendant's assertions that the Plaintiff was the sole cause of the occurrence complained of, it is apparent that there are material facts in dispute that preclude the granting of Defendant's Motion.[1] The Plaintiff's response to Defendant's interrogatories 1 and 3 (see Exhibit A), when read together with the Plaintiff's Deposition (Exhibit B, pp. 34-8) make it clear that the "defective condition" of the boxcar door refers to the door being hard to move. It is uncontradicted based on the evidence before the Court that the Defendant's oral job procedures *required* the Plaintiff to close open doors by himself if physically able to do so.

Since Special Agent Thorn's Affidavit indicates he found the door involved in the occurrence complained of required assistance to close, this knowledge can reasonably be imputed to the Defendant. It is clear from Thorn's Affidavit that he did not report to anyone the door required assistance to close. It was certainly foreseeable that this boxcar door might be opened by persons unknown after Thorn and his co-workers, Kidwell, left scene.

Taking the situation here as a whole, it is clear that the granting of Defendant's Motion would be unwarranted. Based on the Plaintiff's uncontradicted testimony

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[1] Plaintiff draws the Court's attention to two statements on page 6 of Defendant's Argument which are simply inaccurate. The defendant states "He (Holdiness) chose to close the door by himself." This is not true; choice was not the Plaintiff's—he was *required* to close the door by himself if possible. (Exhibit B p. 36) The second statement concerns the assertion on the part of the Defendant that it had no knowledge of a defective condition on the door the Plaintiff attempted to move. This will be dealt with more fully below, but it must be stated that Special Agent Thorn's knowledge the door was hard to close is imputed to the Defendant. See: *Sinkler v. Mo. Pac. RR Co.*, 356 U.S. 326 (1958).

that procedures in force governing the performance of his duty required him to attempt to close the open door if possible, the Plaintiff's testimony *and* Thorn's that there was no apparent defect in the appearance of the door (nor, according to the Plaintiff, was the door off track, Exhibit B, p. 35), negligence on the Plaintiff's part cannot be reasonably inferred due to his decision to try to shut the door. Based on the standard set forth in *Rogers* (whether the negligence of the Defendant played any part, even the slightest, in bringing about the harm complained of) a reasonable jury could certinly find the failure of Thorn to tell anyone that the door required more than one person to close it was the negligence that brought about the harm. Simply put: but for Thorn's failure to report the difficultly with the door, the occurrence complained of would not have taken place. With no apparent defect in the door, a reasonable person would have no reason to suspect more than one person needed be required to close it, only Special Agent Thorn with actual knowledge could warn anyone of the defect, and he did nothing. The negligence of Special Agent Thorn in doing nothing (which, as previously noted is imputed to the Defendant), led directly to the injury the Plaintiff suffered.

III. ANALYSIS OF FACTS AND AUTHORITIES CONCERNING PLAINTIFFS CASE B, THE OCCURRENCE OF JUNE 25, 1987

The question here (in the absence of anything other than Plaintiff's Answers to Interrogatories or Deposition) is whether, based on the Plaintiff's statements, any negligence on the part of the Defendant can be shown. The answer is an unqualified yes.

The Plaintiff testified at his Deposition that there had been quite a few burglaries and thefts in the Locust Point Yard, where the occurrence complained of took place. (Exhibit B p. 71). At the time of the occurrence

complained of, the Plaintiff was alone, checking freight cars when he was attacked by two white males who came up in front of him and struck him with a club. (Exhibit B pp. 72-5) The Plaintiff testified that he could not state exactly from his own personal knowledge where the club (or wood) came from, but that it resembled wood he had seen lying around in the railroad yard. The Plaintiffs also testified that it had been a couple of years since the railroad yard he was patrolling had been cleaned up, and there was wood and debris lying around in the yard. (Exhibit B pp. 75-7)

The Plaintiff, in response to Defendant's interrogatory number 3, which asks the Plaintiff to set forth the facts supporting his allegations of negligence, responded with respect to case B as follows:

> The Defendant was negligent in failing to furnish me with a reasonably safe place in which to work, in keeping its yard clear of debris, requiring me to patrol said area alone, failing to provide me with sufficient manpower, and failing to provide adequate lighting for said area which I was directed to patrol, and also in providing me with defective radio equipment. Plaintiffs reserves the right to claim rule violations.

In support of its Motion for Summary Judgment, the Defendant insists that, because there is no evidence of causal connection between lighting and/or the lack thereof in the New Yard, at Locust Point, and the harm the Plaintiff suffered, and because the Plaintiff cannot prove that the club he was attacked with was the railroad's, they are entitled to have their Motion for Summary Judgment granted. The railroad additionally contends that it was not foreseeable that a piece of wood, which may or may not have come from the Locust Point Yard, would be used as a weapon and that on the additional grounds of absence of foreseeability, they are entitled to have their Motion granted.

Even though there is no testimony, expert or otherwise, as to what the appropriate amount of lighting in the New Yard would be, this is not fatal to the Plaintiff's case. The uncontradicted testimony here reveals certain salient facts from which a jury can infer negligence on the part of the Defendant. It is uncontradicted that there had been numerous burglaries and thefts in the New Yard. Plaintiff further testified that he was aware that arrests have been made in that yard. (Exhibit B p. 71) It is, therefore, unquestioned that criminal activity was occurring in the yard the Plaintiff was patrolling. It is also unquestioned that there is debris, pieces of wood, and so on, around this yard, which has not been cleaned up in a couple of years.

Defendant, in its Motion assumes that the Plaintiff cannot show negligence on the part of the Defendant solely on the issue of lighting. In view of the contradicted testimony above, a reasonable jury could find negligence in the Defendant's failure to provide the Plaintiff with sufficient manpower to patrol the New Yard and the harm complained of.

Nowhere does the Defendant, in its Motion for Summary Judgment, address this issue which is raised by Plaintiff in his answer to Defendant's interrogatory number 3. If negligence may be found in the fact that the Defendant required the Plaintiff to patrol the New Yard alone, and failed to provide him with sufficient manpower in order to safely patrol the yard, then the Defendant's Motion must be denied.

In view of the uncontradicted testimony to the effect that criminal activity is known to be occurring in this precise yard that the Plaintiff was patrolling, it would be reasonable for any jury to conclude that the occurrence complained of was caused by requiring the Plaintiff to patrol alone and failing to provide him with sufficient manpower (that is patrolling in teams) to prevent the

occurrence complained of. The situation here is analogous to that in *Lillie v. Thompson*, 332 U.S. 459 (1947).

In that case, the Plaintiff was a telegraph operator required to work in an isolated part of the Defendant's Memphis Railroad Yard. No provision to light the area or guard or patrol it was made despite the knowledge on the part of the Defendant that the yard was frequented by dangerous persons. The Plaintiff suffered a criminal assault and permanent injury as a result thereof. The trial court dismissed the Complaint for failure to state a cause of action and the 6th Circuit Court of Appeals affirmed without opinion. The Supreme Court reversed saying:

> We are of the opinion that the allegations in the Complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a liklihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intention or criminal conduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence. *Id.*, 461-2.

Here, the situation is substantially the same. The Defendant, with *actual* knowledge of the dangers the Plaintiffs will face makes no provision for the Plaintiff to have additional help on patrol. Based on the Defendant's actual knowledge of the situation in its New Yard, it is certainly foreseeable (as it was in *Lillie* above) that someone will be attacked. It is certainly foreseeable that a lone patrolman may be (as the Plaintiff was) set upon by superior numbers to enable the persons committing

the criminal acts to continue them or escape detection. Here, as in *Lillie*, it cannot be said as a matter of law that Plaintiff's injuries did not at least in part result from the Defendant's negligence.

The issue of where the club used to attack Plaintiff came from is certainly a material fact in dispute. On the one hand, the Plaintiff testified to wood and debris lying around New Yard and that the club resembled the wood around the yard. The Defendant insists that the Plaintiff has not provided "competent proof to authenticate the wood as the Railroad's" and that somehow this failure is fatal to the Plaintiff's case. This is not so. That the Plaintiff was attacked with a club is not questioned. It is also unquestioned that Defendant's counsel is now in possession of the club. Finally, it is uncontradicted that the wood lying about the New Yard resembles that in the club. There are two permissable inferences at this point—either the attackers brought the club with them or picked it up from among the debris in the yard. In any event, whichever theory prevails, either is equally likely and supported by evidence. No, the Plaintiff cannot prove beyond a reasonable doubt that the club used to strike him was in the New Yard for eleven months and twenty-five days—nor to prevail here or at trial does he have to. As the Supreme Court noted in *Landover v. Kurn*, 327 U.S. 645 (1946), whenever there is a factual dispute or "the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." *Id.*, 653. The factual dispute here requires submission.

The Defendant's last two points are easily disposed of. Defendant makes the point that there is nothing to suggest the precise wood used as the club was in the Defendant's yard long enough to put the Defendant on notice of it. This point is irrelevant. The Plaintiff testi-

fied that the New Yard had not been cleaned out in two years and that there were various accumulations of wood and debris in the yard. Two years seem more than sufficient to put the Defendant on notice of a problem.

Finally, the Defendant asserts "it is simply not foreseeable that a piece of wood, from parts unknown, would be used to harm Holdiness". This assertion crosses the boundaries of incredibility. The Defendant would assert it cannot foresee a weapon being used on one of its special agents (and where the wood came from has already been addressed) despite the problems of criminal activity occurring in the New Yard. Here, it is uncontradicted that the Plaintiff knew of burglaries and thefts in the New Yard; knew of arrests by its employees in the New Yard but could not foresee (after having put special agents in the New Yard to suppress criminal activity) that the perpetrators of said activity would use a weapon, either brought by them or thoughtfully provided by the Defendant from one of the wood/debris piles in the New Yard, to injure one of the Defendant's special agents. The proposition here falls of its own weight.

IV. ANALYSIS OF FACTS AND AUTHORITIES CONCERNING PLAINTIFF'S CASE C, THE OCCURRENCE OF OCTOBER 6, 1987

Here again, the Defendant, in its Motion fails to address the Plaintiff's allegations of negligence in their entirety. Again, in his Answers to Interrogatories, the Plaintiff sets out a basis upon which negligence on the part of the Defendant might be found. In his answer to interrogatory number 3, the Plaintiff asserts the Defendant was negligent in failing to furnish him with "proper tools and equipment to restrain prospective arrestees."

The Plaintiff testified that he was issued a hand-held railroad lantern, hardhat, wire twister and bolt bender.

He was not issued a gun, kel-light or nightstick by the Defendant. He was required to purchase a gun by the Defendant. (Exhibit B pp. 99-101) Earlier, the Plaintiff testified that "if Special Agent Thorne had a nightstick, he could have—they show you a hold with Baltimore City Training Academy where you put it around their neck and handle arrestees that way. I think if he had had a nightstick, he could have done that". (Exhibit B p. 95)

There can be no question that it is reasonably foreseeable the Plaintiff and others holding similar positions with the Defendant would be required, at some point, to subdue a suspect. It is therefore, reasonable to expect the Defendant will provide reasonably safe appliances and tools such as are necessary for the Plaintiff to perform his assigned tasks. *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (U.S.C.A. 8th Cir. 1942). *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525 (1951). Here, Plaintiff asserts the failure of the *Defendant* to provide a nightstick was the proximate cause of the harm he suffered.[2] Moreover, the Plaintiff offers clear evidence (set forth above) tending to show why this is so. Unlike the situation cited by the Defendant in *St. Louis-San Francisco Ry. Co. v. Mills*, 271 U.S. 344 (1926), here, the Plaintiff has demonstrated a causal connection between absence of a nightstick being an item of standard issue and the injury suffered by the Plaintiff. As can be seen, the test enumerated in *Rogers* has been met here. There is evidence that the negligence of the Defendant contributed even in the slightest to the harm the Plaintiff suffered. This being the case, the granting of the Defendant's Motion woud be inappropriate.

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[2] It is worth noting that while the Plaintiff insists kel-lights and nightsticks were not items of general issue, Special Agent Thorn, in his Affidavit, states that the Plaintiff was issued a kel-light by the Defendant. A clear factual dispute on this issue.

V. CONCLUSION

Based upon the aforegoing argument, the Plaintiff contends that the Defendant has failed to show itself entitled to summary judgment as a matter of law with respect to Cases A, B or C, and that the Defendant's Motion should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S-90-445

JAMES D. HOLDINESS,
Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant

ORDER

Having read and considered the Plaintiff's Response to Defendant's Motion for Summary Judgment and Memorandum of Authorities in Support thereof, it is this —— day of February, 1991,

ORDERED that the Defendant's Motion for Summary Judgment be and same is hereby DENIED.

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-90-445

JAMES D. HOLDINESS,
Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff's response to Defendant's motion for summary judgment, states as follows:

Defendant, CSX Transportation, Inc., for reply to

I. THE INCIDENT OF FEBRUARY 16, 1987

A. The Plaintiff claims that the Defendant has misstated the record when it indicates that the Plaintiff chose to close the door himself. Defendant respectfully refers the Court to Defendant's Exhibit A, p. 37:

> Q. Okay. Was the suggestion made to get a hold of the car department—
>
> A. That was practical.
>
> Q. I'm not trying to put words in your mouth, but—
>
> A. Yes, we had been told to get a hold of the car department if possible, you know.

Q. Did you make an attempt to do that this evening or did you simply believe that you could close the door?

A. I believed I could close the door.

Q. *So you didn't call the car department?*

A. *No, sir.*

(Emphasis supplied). That Plaintiff may have testified contradictorily somewhere else, although Defendant does not believe Plaintiff has done so, is no bar to summary judgment. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F2d. 970, 975 (4th Cir. 1990).

B. All Agent Thorn's affidavit discloses is that the door was heavy and hard to close. This status does not equal a defect. Nor does the fact that, subsequent to Thorn's closing the door, unauthorized persons reopened the door, impute any "knowledge of defect" to the Defendant. On the contrary, as Thorn found no defect, Defendant's knowledge of "defect" arose, if at all, only when *Plaintiff* discovered the open door and attempted to close it.

C. Because of the intervening act of the burglars/vandals, and the uncontradicted affidavit of "no defect" from Agent Thorn, there is no competent proof of any causal connection between Thorn's encounter with the door and Plaintiffs. Even if Thorn could be deemed negligent (sheer speculation on this record), the intervening reopening of the door makes it impossible to determine what, if any, defect resulted in Plaintiff's injury.

II. THE INCIDENT OF JUNE 25, 1987

A. Plaintiff's knowledge of prior burglaries is immaterial in this case, because *Plaintiff himself* was part of the railroad's effort to detect or prevent each wrongdoing.

B. The question of "sufficient manpower" (Response, p. 10) is speculative, as there is no way to determine if

additional patrol personnel would or could have prevented the incident. *St. Louis-San Francisco Ry. Co. v. Mills*, 271 U.S. 344 (1926).

C. *Lillie v. Thompson* 332 U.S. 459 (1947) is inapposite because it deals with the situation where *no* protection is provided to railroad personnel against foreseeable physical danger. Here, Plaintiff is the embodiment of such protection. Significantly, he can cite no case where a railroad was held derelict in failing to "protect the protectors."

D. Plaintiff does not contend that there was a history of assaults upon railroad police at the Locust Point Yard. In fact, he does not indicate any history of violent crime at that yard. The Defendant had no reason to believe that he was in physical peril, other than what any security personnel may encounter, prior to June 25, 1987.

E. On the issue of the "club", Plaintiff has made no showing that any competent evidence of its being from the railroad yard exists. Plaintiff has not refuted any of the legal citations by Defendant. In fact, Plaintiff concedes (Response, p. 12) that it is equally likely that the assailants brought the club with them, as it is that they found the club in the railyard.

III. THE INCIDENT OF OCTOBER 6, 1987

A. As Plaintiff concedes (Response, p. 14), he only speculated at his deposition that Thorn's use of a nightstick "could have" subdued the perpetrator. This surmise is not competent proof.

B. Plaintiff does not refute that his use of the Kel-light successfully subdued the perpetrator.

C. The source of the Kel-light (Response, p. 15, fm. 2) is not a dispute of material fact.

IV. CONCLUSION

Plaintiff has not demonstrated, as he must, a dispute of material fact such as to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 321 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If anything, Plaintiff's response confirms that all three incidents were simply unfortunate accidents or routine risks which the nature of Plaintiff's employment occasionsd.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 1991, I mailed, postage prepaid, a copy of this Reply to Irving Schwartzman, Esquire, 10th Floor, 5 Light Street, Baltimore, Maryland 21202.

/s/ Stephen B. Caplis
STEPHEN B. CAPLIS

(2)

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-1327

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

JAMES D. HOLDINESS, Petitioner,

v.

CSX TRANSPORTATION, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

James D. Holdiness ("Holdiness" or "Petitioner") was the Appellant in the proceeding below before the United States Court of Appeals for the Fourth Circuit whose per curiam opinion affirmed the judgment of the United States District Court granting summary judgment in favor of CSX Transportation, Inc.

CSX Transportation, Inc., ("CSXT" or "Respondent") was the Appellee in the proceeding before the United States Court of Appeals for the Fourth Circuit. CSXT is a wholly owned subsidiary of the publicly held entity known as CSX Corporation. There are no other publicly held entities that have a direct financial interest in the outcome of this case.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii, iv
STATEMENT OF THE CASE	2
REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED	4
I. THERE ARE NO SPECIAL AND IMPORTANT REASONS THAT WOULD JUSTIFY THIS COURT IN EXERCISING ITS JUDICIAL DISCRETION BY RE-VIEWING THIS MATTER ON WRIT OF CERTIORARI	4
II. THERE IS NO BASIS ON WHICH TO FIND THAT THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS OF WHICH HOLDINESS SEEKS REVIEW IS IN CONFLICT WITH OPINIONS OF THIS COURT	6
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	Page:
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	4
Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1967)	6
Blair v. Baltimore & O. R. Co., 323 U.S. 600 (1945)	9
Branti v. Finkel, 445 U.S. 507 (1980)	6
Celotex v. Catrett, 477 U.S. 317 (1986)	4
Keller v. Adams-Campbell Co., 264 U.S. 314 (1924)	8
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)	5, 8
Lillie v. Thompson, 332 U.S. 459 (1947)	10
McGivern v. Northern Pac. Ry. Co., 132 F.2d 213 (8th Cir. 1942)	11
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)	5
Rogers v. Lodge, 458 U.S. 613 (1982)	5
Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957)	8
Ross v. Moffitt, 417 U.S. 600 (1974)	5
Rudolph v. United States, 370 U.S. 269 (1962)	6
Sanchez v. Gautier, 283 U.S. 798 (1931)	8
Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326 (1958)	10

Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944) 10

Tiller v. Atlantic Coastline R. Co., 318 U.S. 54 (1943) 9

United States v. Johnston, 268 U.S. 220 (1925) . . 6

Webb v. Illinois Central Railroad Co., 352 U.S. 512 (1957) 9

Miscellaneous:

Federal Employers' Liability Act, 45 U.S.C. §51 ("FELA") 4,6,7,8,10,11

Federal Rule of Civil Procedure 56 4

Supreme Court Rule 10 4,5

No. 91-1327

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

JAMES D. HOLDINESS, Petitioner,

v.

CSX TRANSPORTATION, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, CSX Transportation, Inc., respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against Petitioner James D. Holdiness.

STATEMENT OF THE CASE

Petitioner Holdiness at all relevant times was a special agent for CSXT, essentially functioning as a railroad security guard. He had been so employed for seventeen years at the time of the first occurrence cited in his Complaint.

Holdiness carried protective equipment and gear while on the job including a three fifty-seven Magnum Colt revolver, Kel-light stainless steel flashlight, Big Ben lantern, hard hat, wire twister, bolt bender, and a walkie-talkie with which to radio for help should he need assistance in performing any tasks.

Holdiness' job was to patrol the yard. In addition to closing car doors discovered open, Holdiness was to check the contents of the car and report and search for any missing property and possible suspects in connection with the property missing. Should he discover a car door that was difficult to close, Holdiness' instructions were to radio for assistance. Pulljacks were available for his use in closing car doors.

In 1990, Holdiness filed a Complaint in the United States District Court claiming damages from his employer, CSXT, as a result of three alleged on the job incidents, all occurring in 1987.

At the time of the first incident, Holdiness was patrolling at the A&P siding and yard in Halethorpe, Maryland when he discovered an open door of a boxcar. After examining the door and finding no defects or any missing property, he attempted to close the heavy door and felt a pain in his back. Holdiness chose not to request any assistance or a pulljack, both of which would have helped him close the door. Earlier the same day, another CSXT guard had inspected an open door on the same boxcar and after finding no defects, closed it with the human assistance which he had requested.

The second incident about which Holdiness complains occurred when he was patrolling the Baltimore, Maryland

Locust Point Railyard during early morning hours and was struck with a piece of wood by two unidentified assailants who appeared from an unknown location. There is no evidence proving the source of the wood even though Holdiness claimed that it resembled the kind of wood which lay around the railyard. Likewise, there was no evidence that additional lighting on the premises would have prevented the incident in that the location of the hidden assailants prior to the attack was never determined.

The final occurrence about which Holdiness complains took place when he responded to a radio call for assistance from another CSXT special agent while on duty at the Baltimore, Maryland Curtis Bay Railyard. Holdiness and the other special agent chased an unarmed suspected thief. While Holdiness was helping with the arrest, the suspect struck him one time. Holdiness was successful in subduing and handcuffing the suspect after striking him once with his flashlight. The evidence showed, by virtue of the incident itself as well as testimony of another special agent, that the flashlight is appropriately used as a nightstick or baton. Holdiness chose not to use his revolver to subdue the suspect. There was no evidence that would prove that additional security personnel or equipment could have prevented the single blow received by Holdiness at the hands of the assailant.

Based upon the record proof cited above as to which there was no genuine dispute of material fact and the fact that CSXT was entitled to judgment as a matter of law, the United States District Court granted the motion for summary judgment by CSXT as to the entire Complaint brought against it by Holdiness. The United States Court of Appeals for the Fourth Circuit affirmed that decision by per curiam opinion.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Holdiness filed his Petition for Writ of Certiorari in this Court seeking yet another opportunity to argue his Federal Employers' Liability Act ("FELA") cause of action and claim for damages against CSXT. Every court examining it has found that Holdiness has no sustainable claim. The United States District Court for the District of Maryland granted summary judgment in favor of CSXT as to the entire complaint because there was no issue of material fact and because CSXT was clearly entitled to judgment as a matter of law under the standards enunciated by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See* Rule 56 of the Federal Rules of Civil Procedure. Summary judgment was entered for CSXT because the proof adduced would not justify a reasonable factfinder in finding for Holdiness absent speculation or guesswork. The United States Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in favor of CSXT by unanimous per curiam opinion. Because there is no proper ground for granting the Petition for Writ of Certiorari, it should be denied.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS THAT WOULD JUSTIFY THIS COURT IN EXERCISING ITS JUDICIAL DISCRETION BY REVIEWING THIS MATTER ON WRIT OF CERTIORARI.

The law is clear that review on a writ of certiorari is not a matter of right, but rather of judicial discretion. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10. A limited number of situations where a petition for writ of certiorari might be granted are described in the Supreme Court Rules, all of which are bound by the special and important reasons requirement. Those situations essentially involve cir-

cumstances in which lower courts have rendered conflicting decisions on important matters. In an effort to portray this scenario, Holdiness claims that his petition for writ of certiorari should be granted because the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against him conflicts with prior decisions of this Court. Quite to the contrary, none of the decisions cited in purported support of the petition could reasonably be characterized as conflicting with the opinion in Holdiness' case.

Review by this Court is discretionary, even where the correctness of the decision below is justifiably challenged. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). For the petition for writ of certiorari to be granted, the case must involve principles important to the public and not just the parties.

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties ...."

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit to satisfy a scholarly interest ... Nor does it sit for the benefit of the particular litigants")

Certiorari is improvidently granted where the petitioner seeks to have this Court disturb findings of fact established below, especially where as here, the factual findings have been concurred in by two lower courts, the Circuit Court of Appeals and the United States District Court. *See: Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower

courts"); *Branti v. Finkel*, 445 U.S. 507, 511 (1980) ("In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous"); *Rudolph v. United States*, 370 U.S. 269 (1962) (This Court dismissed a writ of certiorari improvidently granted because the findings of fact concurred in by two courts below resolved the determinative factual issues against the petitioner); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967) (This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); and *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

II. THERE IS NO BASIS ON WHICH TO FIND THAT THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS OF WHICH HOLDINESS SEEKS REVIEW IS IN CONFLICT WITH OPINIONS OF THIS COURT.

Although Petitioner claims a conflict between prior holdings of this Court and the decision in his case by the Fourth Circuit Court of Appeals affirming the grant of summary judgment against him, the Petition for Writ of Certiorari is in fact an attempt to have this Court disturb the factual findings below.

As to each of the three occurrences for which Holdiness sought damages from CSXT in his Complaint, the United States District Court found that there was no evidence of negligence by CSXT under the Federal Employers' Liability Act necessary to sustain a claim. *See* Memorandum Opinion, February 7, 1991, granting CSXT's motion for summary judgment (Joint Appendix 203-208). The opinion of the United States District Court reemphasized the fact that the FELA is not equivalent to

a no-fault workers' compensation scheme, but remains a fault-based system whereby a railroad employee must prove that negligence by the railroad actually caused or contributed to his injury.

As to the first cited occurrence wherein Holdiness claims he sustained back pain while closing a boxcar door, the District Court found that the evidence produced did not show any defect in the door, nor was there any evidence proving that the alleged injury occurred for any reason other than the fact that Holdiness chose to close the door himself without the use of an available tool or assistance from another employee.

Holdiness also complains of an alleged injury sustained when he was hit with a piece of wood by an unknown assailant. The District Court found there was no evidence from the facts produced during discovery that the condition of the railroad yard was inadequate for the simple reason that "railroad yards could not be kept free of potential weapons even under the utmost exercise of care". Likewise, there was no evidence that the alleged deficiency in the lighting of the yard had any causal relation whatsoever to the attack, nor was there any evidence upon which a reasonable jury could find that CSXT was responsible for the incident by virtue of not providing guards to protect other guards.

Finally, as to the third incident for which Holdiness seeks damages, the District Court determined correctly that CSXT could not be found liable under the FELA because Holdiness was struck once by an arrestee, whom Holdiness and another guard were attempting to apprehend. There was simply no material question of fact as to the adequacy of the tools available to Holdiness to do his job. The evidence showed that Holdiness chose not to use his revolver in subduing the suspect, and was in fact able to successfully apprehend the suspect by the use of his flashlight, regardless of whether he carried a tool specifically called a nightstick. These factual findings, when taken together,

evidenced no negligence by CSXT causing injury to Holdiness so as to justify recovery under the FELA. As such, the United States District Court granted the motion for summary judgment by CSXT. The Circuit Court of Appeals for the Fourth Circuit affirmed.

Despite these clear findings of fact mandating summary judgment, which findings were undisturbed on appeal, Holdiness attempts to reargue them to this Court. Absent a "real and embarrassing conflict of opinion and authority", however, certiorari is unwarranted. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). What Holdiness portrays as a conflict of opinion is, in fact, his dissatisfaction with the factual findings of the lower courts as to which he has no reasonable ground for challenge. Where this Court has found upon an examination of the record that the challenged decision of the Circuit Court of Appeals was not truly in conflict with the decisions cited by petitioner, the writ of certiorari has been dismissed as improvidently granted. *See*: *Sanchez v. Gautier*, 283 U.S. 798 (1931); and *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924).

The alleged basis of the Petition for Writ of Certiorari is a distilled version of the same factual arguments rejected by the United States District Court and the Fourth Circuit Court of Appeals, per curiam. None of the cases cited in the petition conflict with the decision of the Fourth Circuit herein.

All of the cases Petitioner cites show evidence of negligent conduct by the railroad as well as a causal connection between that conduct and the injury alleged. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), is an action under the FELA for damages claimed by a railroad laborer injured when burning weeds as the result of a slip and fall which occurred when he was retreating from flames fanned by the passing train. The Missouri Supreme Court had reversed a jury verdict awarding damages to the employee, basing the decision upon the premise

that the railroad should not be liable where the employee's conduct was at least as probable a cause for the mishap as any negligence of the railroad. This Court found that to be the wrong standard, further finding that the record below showed ample evidence of causal negligence by the railroad including the fact that the burning of weeds was normally done by flame throwers from cars on the tracks as opposed to by workmen on foot, coupled with the fact that common experience teaches that a passing train will fan the flames of a fire.

Webb v. Illinois Central Railroad Co., 352 U.S. 512 (1957), is likewise a case in which there was clear evidence of negligent conduct by the railroad causing injury. The railroad employee in *Webb* was injured due to a fall when he stepped on a clinker in the railroad's roadbed. There was evidence that the area in question had been elevated some three weeks prior to the accident and yet contrary to the railroad's custom and practice, the ballast had not been screened or inspected for the purpose of preventing just such clinkers as caused the injury at issue.

Similarly, in *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600 (1945), this Court found clear evidence of negligent conduct by the railroad, causally connected to the injury alleged. As in *Webb*, the proofs showed the accident complained of occurred because of a deviation from custom and practice. The plaintiff in *Blair* was injured when unloading greased pipes which were thirty feet long and weighed one thousand pounds. Because it was not customary for the railroad to unload pipes of this type at its warehouse, the equipment available for the task was a truck of an insufficient size to properly and safely carry out the job. Furthermore, the injured employee had informed his supervisor prior to attempting the task that it could not be accomplished without additional help.

Tiller v. Atlantic Coastline R. Co., 318 U.S. 54 (1943), cited by Holdiness in support of the general proposition that a railroad must provide a reasonably safe place in which to work,

is clearly inapposite. That opinion is premised entirely upon the ruling of the appellate court that the employee had assumed the risk of his injury. This Court held that a finding for the railroad based on assumption of risk was necessarily wrong by virtue of the clear language of the 1939 amendment to the FELA.

Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326 (1958), which Holdiness cites on the purported issue of notice of defect, in fact is an opinion based upon the issue of when third party negligence is properly attributable to the railroad on an agency theory. The evidence proved that the third party switching crew negligently caused the car on which the employee complainant was riding to collide with another railroad car, resulting in his injury. Because the switching crew was an agent of the railroad, in that the railroad owned one half of the stock of the agent corporation and designated half of its directors, the railroad was liable for the negligent conduct.

Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944), is likewise a case in which the petitioner railroad employee was required to present probative facts from which the negligence of the railroad and its causal relation to the alleged injury could be proven. It was specifically noted that only "*[i]f* that requirement is met ... the issues may properly be presented to the jury." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. at 33. *Tennant* was a claim for the wrongful death of a railroad employee of a switching crew killed on the job in a nighttime accident. Proof of the railroad's negligence was in evidence that an engineer had caused the train to move without sounding the customary warning bell.

Holdiness cites *Lillie v. Thompson*, 332 U.S. 459 (1947), to contend that CSXT was responsible for the criminal act of an unknown assailant. In contrast to the facts herein, the complainant in *Lillie* was a twenty-two year old telegraph operator required to work alone between the hours of 11:30 p.m. and 7:30 a.m. in a building in an isolated part of the railroad yard. As part

of her job she was forced to admit railroad workers who knocked demanding entry, but was unable to ascertain their identity because there were no windows by which to see out. The complainant in *Lillie* was attacked by an assailant, not a railroad employee, with a large piece of iron, who entered the door when she opened it in response to a knock. Unlike Holdiness, Lillie herself was not employed by the railroad to guard against the very danger about which she complained.

Finally, Holdiness cites *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942), which provides no support whatsoever for the petition. The suit in *McGivern* was brought to recover damages for the death of a railroad switchman killed as the result of a fall from a footboard covered with ice and snow. The complainant contended that the railroad was negligent by failing to provide a safe place in which to work by allowing ridges of ice to accumulate on the footboards, failing to furnish the proper equipment and material to remove the snow and ice, and failing to adopt any rule or custom and practice requiring the removal of such snow and ice. In finding no substantial evidence proving negligence by the railroad causing the injury complained of, the Court reemphasized the rule that a right of recovery under the FELA must be predicated upon negligence. Because the negligence causing the injury was that of the employee alone, there could be no rightful recovery against the railroad.

None of these holdings conflict with the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against Holdiness. For this reason, and because there are no special and important reasons that would justify this Court in exercising its judicial discretion by reviewing this matter on writ of certiorari, the Petition For Writ Of Certiorari should be denied.

CONCLUSION

For all of these reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 91-1327

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES D. HOLDINESS,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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LIST OF PARTIES

James D. Holdiness ("Petitioner") was the Appellant in the proceeding below before the United States Court of Appeals for the Fourth Circuit whose per curiam opinion affirmed the judgment of the United States District Course granting summary judgment in favor of CSX Transportation, Inc.

CSX Transportation, Inc., ("Respondent") was the Appellee in the proceeding before the United States Court of Appeals for the Fourth Circuit. CSXT is a wholly owned subsidiary of the publicly held entity known as CSX Corporation. There are no other publicly held entities that have a direct financial interest in the outcome of this case.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED	1
CONCLUSION	3

TABLE OF AUTHORITIES

Cases:	Page
Green v. River Terminal Ry. Co., CCA 6, 1985, 763 F.2d 805	3
Johnson v. Southern Pacific Co., 25 S.Ct. 158, 196 U.S., 49 L.Ed. 363	3
Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957)	2
Statutes:	
Federal Employers' Liability Act, 45 U.S.C. § 51	2, 3
Miscellaneous:	
Supreme Court Rule 10	1

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PETITIONER'S REPLY BRIEF

Petitioner, James D. Holdiness, respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari seeking review of the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against Petitioner James D. Holdiness.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The Petitioner recognizes that review on a Writ of Certiorari is a matter of judicial discretion and that "a Petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10. The Petitioner submits that there are special and important reasons therefor.

The mere fact that the District Court granted summary judgment and the Court of Appeals affirmed by per

curiam opinion should not and cannot be conclusive as the reason for a denial of review by this Court, especially when there was a glaring error committed by both lower courts.

In the first case, the Petitioner was inspecting a box car on which the door was open. The rules of the Respondent required an employee to try to close said door before seeking the assistance of a co-employee or other equipment. The evidence indicated that a co-employee, earlier the same day, was confronted with the same open door on the same box car and then sought aid, and with the assistance of another co-employee was able to close the box car door. This, we submit, created a foreseeable danger to any other employee who might later be confronted with the same door on the same box car. The Respondent was aware of the previous incident to the other co-employee so that it was obligatory on the part of the Respondent, in order to comply with its duty to furnish its employees with a reasonably safe place in which to work, to have warned the Petitioner of the potentially dangerous condition of said box car door, but it failed to do so. When the Petitioner firstly attempted to close the door by himself, as required, the inevitable occurred—the foreseeable danger became a reality, and he was injured. The Respondent's failure to have done what it was required to do was negligence.

The Federal Employers' Liability Act provides that a Railroad shall be liable in damages for negligence, which in whole or in part, (and even in the slightest, says this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957)), causes injury to one of its employees. The failure of the Respondent to have warned the Petitioner of the prior incident was evidence of negligence, more than even the slightest, and constitutes a special and important reason for the granting of the Petition for Writ of Certiorari.

The same situation prevails with the second and third incidents which would likewise constitute special and im-

portant reasons for the granting of the Petition for Writ of Certiorari.

The Federal Employers' Liability Act, by its history, mandates that the Act is to be liberally construed in favor of the injured worker, in order to effect its remedial purpose. *Johnson v. Southern Pacific Co.*, 25 S.Ct. 158, 196 U.S., 49 L.Ed. 363. See also *Green v. River Terminal Ry. Co.*, CCA 6, 1985, 763 F.2d 805. This Court has granted Petitions for Writ of Certiorari many times in which the railroads have argued that certiorari was improvidently granted, which is the same position the Respondent has taken in this case.

CONCLUSION

In conclusion, to deny the Petition for Writ of Certiorari would be a gross miscarriage of justice.

Respectfully submitted,

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